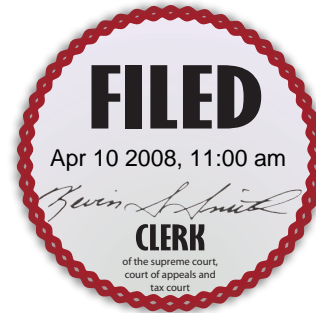


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**IN THE
COURT OF APPEALS OF INDIANA**

DANIEL FAVELA,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 02A03-0702-CR-101
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0602-MR-2

April 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Daniel Favela appeals his conviction for murder, a felony.¹ Favela raises three issues, which we revise and restate as:

- I. Whether the trial court abused its discretion when it denied Favela's request to obtain the address of the Fort Wayne Women's Shelter ("the Shelter");
- II. Whether the trial court abused its discretion by excluding the testimony of a defense witness for the purpose of impeachment; and
- III. Whether the evidence was sufficient to sustain his conviction.

We affirm.

The relevant facts follow. Favela and Nicole Favela had been married almost seven years and had three children when Nicole filed for divorce in August 2005. In October 2005, Favela found out that Nicole was seeing Jeffery Kramer, her coworker at a local store. One day, while Nicole was at Kramer's house, Favela knocked on the front door, and, when Kramer opened it, Favela "pushed his way in." Transcript at 334. Favela "took [Kramer] back in a room and they talked," then Favela "pulled [Nicole] out" of the house and they left. Id. at 334-335.

Over the next few months, Favela threatened Nicole regularly and also made threats to Nicole about Kramer and Nicole's mother. Favela told a friend that he "felt like beating [Kramer's] ass." Id. at 470. He also told Nicole that if she followed through with her divorce, she would be "found dead." Id. at 336. During another argument about her going to Kramer's house, Favela said that "he could kill [Nicole] and nobody would

¹ Ind. Code § 35-42-1-1 (2004) (subsequently amended by Pub. L. No. 151-2006, § 16 (eff. July 1, 2006), Pub. L. No. 173-2006, § 51 (eff. July 1, 2006), and Pub. L. No. 1-2007, § 230 (eff. March 30, 2007)).

know the difference.” Id. at 337. They argued on another occasion about Kramer, and Favela “put a pillow over [Nicole’s] face.” Id. Once, when Favela and Nicole passed Kramer on the street, Favela told Nicole that “if he ever caught [them] together, he’d bash [their] heads together.” Id. On February 14, 2006, while Favela was at work, Nicole’s mother and Kramer helped Nicole and the children move out of the house. Kramer agreed to keep some of Nicole’s things while she and the children stayed at the Shelter.

Soon, Nicole began receiving messages on her cell phone from Favela, but she would not return his calls until she had a protective order. On February 16, 2006, Nicole met Kramer at her mother’s house to give Kramer more of her things and then returned to the Shelter. She never saw him again.

The following evening, while Kramer was at work, his childhood friend and neighbor Justin Madden saw Favela sitting in a car outside Kramer’s house. Madden called Kramer to tell him that Favela was at his house, and then Madden left to pick up his girlfriend. When he returned, Favela’s car was gone, but Favela was standing in the shadows by Kramer’s house. As Madden drove by the house, Favela “came walking out of the shadows,” and Madden again called Kramer. Id. at 219. Kramer called his parents and asked them to “check out the house.” Id. at 220.

Madden, his brother, and his girlfriend met Kramer’s parents at the house, where they waited for Kramer to arrive from work. Shortly after Kramer arrived, Favela knocked at the door. When Kramer’s father answered, Favela tried to force his way inside. Pretending to be the landlord, Kramer’s father backed Favela out of the house and

asked him why he was bothering “his tenant.” Id. at 224. Favela responded that he was “just wanting to warn [Kramer] about this guy whose [sic] going to burn down his house.” Id. Kramer’s parents asked to see Favela’s license and where he was parked, as his vehicle “wasn’t outside anywhere.” Id. at 225. The parents walked Favela to his car, which was “parked down at the next road, about six . . . houses down,” and took down Favela’s license plate. Id. at 282-283. As Kramer’s parents turned to leave, Favela suddenly claimed to have lost his keys back at the house. Madden, the Kramers, and Madden’s girlfriend then “were all looking all over the ground and in bushes to look for his keys.” Id. at 227. They continued searching for the next half hour, during which Favela was “calm” but always kept one hand in the large front pocket of his hooded sweatshirt. Id. at 228. Madden noticed that Favela never took his hand out of the pocket “until he had his other hand inside” it. Id. at 229. Finally, when they told Favela to take a taxi, Favela remembered that he had a spare key in his car and left. Around twenty minutes later, Favela again knocked on Kramer’s door, this time purporting to have the address and license plate of the person he claimed was going to burn down Kramer’s house. Favela also informed them that he had found his keys, which had been in his pocket. Favela left again, and Kramer went to stay the night with one of Madden’s brothers.

The next day, Favela and Kramer pulled their cars up side by side in a school parking lot, and Favela walked over to Kramer’s car, where they “started talking about different things.” Id. at 775. They spoke for ten or fifteen minutes, and Favela left. Later that day, Kramer was found dead in his car in the parking lot. The driver’s window

had been shattered, and Kramer had been shot four to six times at close range with a 9mm handgun. In the car near Kramer's body was a blue pen and a piece of paper containing a list of "different vehicles." Id. at 543. That same day, Nicole telephoned Favela, who told her that she could now call him "with no problems." Id. at 350.

The State charged Favela with murder and filed an application for an additional fixed term of imprisonment for the use of a firearm in the commission of a murder.² On June 20, 2006, during the deposition of two detectives who had worked on the case, Favela's attorney requested the address of the Shelter, but the detectives responded that the address was confidential. Favela's attorney certified the question and filed a motion to compel answers, arguing that the address of the Shelter was "imperative to [Favela's] constitutional rights . . . as it could lead to pertinent evidence concerning the defense in this case." Appellant's Appendix at 23. The trial court denied this motion.

Favela later filed a motion to exclude the Shelter's logbook from the evidence. At the hearing on the motion, Favela's attorney again asked to have the address of the Shelter, and the following exchange occurred:

[Favela's Attorney]: Could I have the address of the Women's Shelter Judge, pursuant to Administrative Rule 9, we could put it in the confidential thing, folder. Because, you know, I'll try to get out there this weekend

COURT: Do you wish to address that [prosecutor?]

[Prosecutor]: Judge, I, I can give him, I don't know. I don't think it's necessary to actually give him the address. I can give him and put him in touch with anybody he needs to be in touch with at the Women's Shelter.

² Ind. Code § 35-50-2-11 (Supp. 2005).

COURT: Okay.

[Favela's Attorney]: Judge, I would like to see where this [log]book is located, physically. The outlay of the building. If there's any other means if [sic] ingress or egress. I think those are all pertinent if in fact the Court's going to allow those records to come . . . I'm just trying to assure my client a fair trial.

COURT: Your client will get a fair trial

[Favela's Attorney]: I don't know if he will if we can't observe that though Judge, because that's certainly going to be an issue that the State now has raised and opened the door.

COURT: I'm sure that the State can provide that information to you.

[Favela's Attorney]: What, of the outlay.

COURT: The information that you are seeking.

[Favela's Attorney]: The address.

COURT: I'm sure there is a floor plan of this facility. I'm sure there are ingress and egress noted on any type of floor plan. I'm sure they can show you or have a witness show you on a map where the book was located within the facility. I'm sure that's information that you have or have access to or can provide.

[Prosecutor]: Certainly, Your Honor.

Hearing Transcript at 16-17. Favela then filed a motion to observe the Shelter, which the trial court denied. On the morning of the trial, Favela filed a "Written Objection" arguing that the denial of access to the Shelter or to the names and addresses of other residents of the Shelter on the logbook violated his constitutional right to due process and prejudiced his right to a fair and impartial trial. Appellant's Appendix at 41.

At the trial, Indiana State Police Sergeant Mark Keisler testified that the Taurus 9mm handgun was one of twenty-three guns that matched the casings fired at the crime

scene. One of Favela's coworkers testified that Favela had claimed to own a Taurus 9mm handgun. Favela denied having made this claim and asserted that he owned a .22 caliber handgun, which he had kept in a safe in the hidden compartment of a coffee table. Fort Wayne Police Detective Cary Young testified that the police found neither the 9mm nor the .22 caliber handgun.

At one point, Favela's attorney questioned Nicole as follows:

Q Now, was the gun ever in the red Grand Am trunk?

A No.

Q Never?

A No.

Q You never made a statement to anyone about that?

A No.

Transcript at 838. After Nicole's testimony, Favela's attorney called Michael Thomas as a defense witness, and the State objected as follows:

[Prosecutor]: Your honor, the State renews its objection with respect to this witness's testimony about any inconsistent statement regarding the trunk of that vehicle. It was clear, [Favela's attorney] said he had information to ask—ask [Nicole Favela], and I think it's apparent that the only other thing he asked her was completely irrelevant to this case.

[Favela's attorney]: Well, I—Judge, I think it was pretty relevant because her father indicated that he had never given her any letters, and you know, just another method of impeachment.

THE COURT: I—I agree. I mean, my problem now is you never confronted her with the specific statement.

[Prosecutor]: Right.

THE COURT: You can't just say "Did you make a statement?"

[Prosecutor]: You have to be confronted with that exact statement, to who you made it, and when.

THE COURT: So if the purpose for him is this, then no.

[Favela's attorney]: Okay.

Id. at 840. Favela's attorney then dismissed Thomas.

Favela testified that, on the day Kramer was killed, Favela was out driving when he heard a "beep" and saw Kramer in the car next to him. Id. at 774. Kramer motioned for Favela to lower his window and asked if they could talk. After they pulled over in the school parking lot, Kramer asked Favela about "different cars" and then about his "wife cheating." Id. at 775. Favela took some paper from his car and wrote down what Kramer was saying about the cars, and then Kramer wrote down some information about the cars, after which Favela left.

Detective Young testified that, during the investigation, Favela had given him three different stories of what happened when Kramer was killed: (1) that Favela had spoken to Kramer in Kramer's car and then left, and that he did not know what happened to Kramer after he left; (2) that Favela was in Kramer's car for a while, and then Favela's cousin killed Kramer after Favela left; and (3) that Favela was in Kramer's car when Favela's cousin killed Kramer. The jury found Favela guilty as charged. The trial court sentenced him to fifty-five years for murder enhanced by five years for the use of a firearm in the commission of murder for a total sentence of sixty years in the Indiana

Department of Correction. Favela later filed a motion to correct errors, which the trial court denied.

I.

The first issue is whether the trial court abused its discretion when it denied Favela's request to obtain the address of the Fort Wayne Women's Shelter. A trial court is accorded broad discretion in ruling on issues of discovery. State v. Pelley, 828 N.E.2d 915, 923 (Ind. 2005). On review, we presume that the trial court's decision is correct, and the party challenging the decision has the burden of persuading us that the trial court abused its discretion. Id. (citing Sears Roebuck & Co. v. Manuilov, 742 N.E.2d 453, 457 (Ind. 2001)). There are two principal questions that a trial court must consider in ruling on questions relating to discovery in a criminal trial: (1) whether there is a sufficient designation of the items sought to be discovered; and (2) whether the items sought are material to the defense. Thompson v. State, 702 N.E.2d 1129, 1130-1131 (Ind. Ct. App. 1998) (citing Jorgensen v. State, 574 N.E.2d 915, 917 (Ind. 1991)). If the answers to both questions are affirmative, the trial court must grant the discovery motion unless the State makes a showing of paramount interest in nondisclosure. Id. at 1131 (citing Jorgensen, 574 N.E.2d at 917).

Favela claims that part of his defense was the possibility that Nicole killed Kramer. As Nicole claimed to have been at the Fort Wayne Women's Shelter on the day Kramer was murdered, Favela argues that the trial court denied him the opportunity to discover material evidence and deprived him of a fair trial "[b]y refusing to provide

counsel for Favela with the location of the Fort Wayne Women's Shelter." Appellant's Brief at 13.

At the hearing on Favela's motion to exclude the Shelter logbook, Favela's attorney requested the Shelter's address so that he could study the location of the logbook within the building as well as the building's layout. The court responded that he could have a floor plan and map of the facility, and the prosecutor stated that he could "give him and put him in touch with anybody he needs to be in touch with at the Women's Shelter." Hearing Transcript at 16. Favela noted in his motion to correct errors that the State provided him with photographs as well as a "sign-in sheet" from the facility. Appellant's Appendix at 48. Moreover, at trial, he had photographs of the Shelter admitted into evidence and examined witnesses about the Shelter's layout. Favela has failed to show how obtaining the Shelter's address would aid in the discovery of information unobtainable by other means. Accordingly, he has failed to show that the Shelter's address was material to his defense, and we therefore conclude that the trial court did not abuse its discretion by denying his discovery request. See, e.g., Thompson, 702 N.E.2d at 1131 (holding that the trial court did not abuse its discretion by denying defendant's discovery request).

II.

The second issue is whether the trial court abused its discretion by excluding the impeachment testimony of Michael Thomas. Decisions concerning the admission and exclusion of evidence are within the broad discretion of the trial court, and we will find

error only upon a showing by the appellant that the trial court abused its discretion. Hook v. State, 705 N.E.2d 219, 220 (Ind. Ct. App. 1999), trans. denied.

A witness's prior inconsistent statement may be used for impeachment purposes. See Ind. Evid. Rule 613. Ind. Evid. Rule 613(b) provides that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." Although the rule does not specify when the witness must be afforded the opportunity to explain the prior statement, the longstanding rule in Indiana is that, to impeach a witness with a prior inconsistent statement, "a proper foundation must be laid to warn the witness and enable him to admit, explain, or deny the prior statement." Roberts v. State, 712 N.E.2d 23, 32 (Ind. Ct. App. 1999) (citing Coleman v. State, 588 N.E.2d 1335, 1340 (Ind. Ct. App. 1992), trans. denied), trans. denied. Laying a proper foundation is accomplished by bringing to the witness's attention the circumstances under which the contradictory statements were made. Maynard v. State, 513 N.E.2d 641, 647 (Ind. 1987). This is so even when the impeachment testimony is offered by a third party. Id.

Here, Favela's attorney asked Nicole whether "the gun" was ever in the trunk of the "Red Grand Am," and Nicole responded, "No." Transcript at 838. Next, Favela's attorney asked Nicole, "You never made a statement to anyone about that," and Nicole again responded, "No." Id. Favela claims that Thomas would have testified "about an

inconsistent statement involving the gun and the trunk of the vehicle.” Appellant’s Brief at 19.

We note that, from the record, it is unclear whether Favela’s attorney was asking Nicole about the 9mm Taurus or the .22 caliber handgun. Likewise, concerning the question of whether Nicole had ever “made a statement to anyone about that,” it is not entirely clear whether Nicole was being asked about the gun itself, the trunk, or whether she had told someone that the gun was in the trunk. Id. Finally, the trial court correctly noted that Favela’s attorney did not confront Nicole with the allegedly inconsistent statement. Given the vagueness of the questions before Nicole and the fact that Favela’s attorney did not bring Nicole’s attention to the circumstances of the allegedly inconsistent prior statement, we conclude that the trial court did not abuse its discretion by excluding Thomas’s impeachment testimony for lack of foundation. See, e.g., Maynard, 513 N.E.2d at 647 (“Since Appellant failed to lay the necessary foundation for introducing this impeachment testimony, the trial court did not err in ruling it inadmissible.”).

III.

The third issue is whether the evidence is sufficient to sustain Favela’s conviction for murder. When reviewing the sufficiency of the evidence to support a conviction, “appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict.” Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007) (quoting McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005)). It is the fact-finder’s role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. Id. (citing Wright v. State, 828 N.E.2d

904, 906 (Ind. 2005)). To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it “most favorably to the trial court’s ruling.” Id. (quoting Wright, 828 N.E.2d at 906). Appellate courts affirm the conviction unless “no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). It is therefore not necessary that the evidence “overcome every reasonable hypothesis of innocence.” Id. at 147 (quoting Moore v. State, 652 N.E.2d 53, 55 (Ind. 1995). “[T]he evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” Id. (quoting Pickens v. State, 751 N.E.2d 331, 334 (Ind. Ct. App. 2001)). Favela argues that “[b]ased upon the evidence presented at [the] trial, no reasonable factfinder could find that Favela was the one that shot and killed [Kramer].” Appellant’s Brief at 17. We disagree.

The evidence supporting the verdict reveals that Favela threatened Nicole numerous times and also made threats to her about Kramer and her mother. He told a friend that he “felt like beating [Kramer’s] ass.” Transcript at 470. Favela once forced his way into Kramer’s house to talk to him, and he tried to force his way into the house a second time when Kramer’s father stopped him. After Nicole left him, Favela was seen standing in the shadows outside of Kramer’s house. He was wearing a hooded sweatshirt with a large front pocket, and, while Madden and the Kramers were looking for Favela’s keys, Favela acted suspiciously, as he never removed one hand from the pocket without placing the other hand inside.

Favela was admittedly with Kramer in the parking lot where Kramer was found shot to death later that day. Kramer was shot with a 9mm handgun, and one of Favela's coworkers testified that Favela had claimed to own a Taurus 9mm handgun, one of twenty-three guns that match the casings found at the crime scene. Favela gave the police three different accounts of what happened the day Kramer was killed, one of which was that Favela was with Kramer when Favela's cousin killed Kramer. He later told Nicole that she could now call him "with no problems." Id. at 350.

Although Favela argues that "his account of what happened when he was in [Kramer's] car does not provide evidence . . . that he killed Kramer," we conclude that Favela would have us reweigh the evidence, which we cannot do. See Drane, 867 N.E.2d at 146. Given the facts of the case, we conclude that the State presented evidence of probative value from which a reasonable trier of fact could have found Favela guilty beyond a reasonable doubt of murder. See, e.g., Malinski v. State, 794 N.E.2d 1071, 1087 (Ind. 2003) (holding that the circumstantial evidence was adequate to allow a jury to conclude beyond a reasonable doubt that defendant murdered the victim).

For the foregoing reasons, we affirm Favela's conviction for murder.

Affirmed.

BARNES, J. and VAIDIK, J. concur